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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF,
Plaintiff in Error,

vs.

THE UNITED STATES.

~~No. 614.~~
~~October Term, 1903.~~

~~No. 231.~~
~~October Term, 1903.~~

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

A BRIEF FOR PLAINTIFF IN ERROR.

JOHN MAYNARD HARLAN,
For Plaintiff in Error.

WILLIAM D. GUTHRIE,
Of Counsel.

WASHINGTON, OCTOBER TERM 1903.

THE GUNTHORP-WARREN PRINTING CO., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF, *Plaintiff in Error,*	No. 614. October Term, 1902.
vs.	
THE UNITED STATES.	No. 221. October Term, 1903.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

A BRIEF FOR PLAINTIFF IN ERROR.

Whether, under the terms of the Act of Congress commonly known as the "Oleomargarine Act," as amended, the use of palm oil, causing oleomargarine "to look like butter of any shade of yellow," renders such oleomargarine subject to a tax of ten cents per pound, or to a tax of only one-fourth of one cent per pound, is a question, the proper answer to which, the writer believes, must lead to a reversal of the Cliff case, even though the constitutional questions involved in the consolidated cases, of which the Cliff case is one, should be decided adversely to the plaintiffs in error.

With the consent of counsel for the plaintiff in error and of the Solicitor General, the writer presents this brief for the plaintiff in error in the Cliff case, because the decision of that case may have important bearing upon another case now pending in the Circuit Court of the United States for the Northern District of Illinois, in which the writer's client is suing to recover a large sum paid under compulsion and protest, as an internal revenue tax, at the rate of ten cents per pound, upon oleomargarine, previously sold tax-paid at one-fourth of a cent per pound,—the oleomargarine there in question having contained palm oil, which caused it "to look like butter" of a "shade of yellow."

It is not proposed here to discuss the constitutional questions involved in the consolidated cases of which this is one, for those questions have been presented and argued already with distinguished ability by counsel representing the plaintiffs in error. It is proposed merely to offer some suggestions, with a view to showing that, even if the Federal oleomargarine law, as it now stands, be held to be constitutional, in all its provisions, yet the oleomargarine purchased and received for sale by the plaintiff in error, Cliff, was subject to a tax only of one-fourth of a cent per pound, which had been duly paid, and therefore the criminal information against Cliff was not well founded.

The information charges that August Cliff sold "ten pounds of a mixture and compound, composed, as the said August Cliff well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil (which said last named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow)," and that said oleomargarine "was contained in a new wooden, original manufacturer's package, to which,

as he, the said August Cliff, then and there well knew, no coupon, stamp or stamps, *in the sum of ten cents for each pound* of oleomargarine so contained therein, then and there had been or was affixed by the said manufacturer, or by any other person, for denoting payment of the internal revenue tax on the oleomargarine so contained therein."

The government's evidence showed that the ten-pound package bore a tax-paid stamp of one-fourth of a cent per pound, and that otherwise "the package was marked, stamped and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue"; that "the contents of the package * * * was composed of oleo oil, neutral, lard, cotton-seed oil, milk, common salt and palm oil"; that the palm oil caused said oleomargarine to look like butter of "a shade of yellow," and that the information, charging as a violation of law the purchasing and receiving for sale of the ten-pound package without the payment of a tax of ten cents per pound, was based upon a ruling of the Commissioner of Internal Revenue, contained in his letter addressed to Mr. W. J. Moxley, under date of August 11, 1902, which ruling was as follows:

> "This office rules that where so minute and infinitesimal a quantity [in that instance one-third of one per cent.] of a vegetable oil is used in the manufacture of oleomargarine, as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and therefore that the oleomargarine so colored is not free from artificial coloration, and becomes subject to the tax of ten cents per pound."

The government disavowed any claim that Cliff offered the article for sale as butter.

It thus appears that the government's claim IS NOT that all oleomargarine containing palm oil which causes it "to look like butter of any shade of yellow," is subject to the tax of ten cents per pound; but the claim is only that, such oleomargarine as contains an amount of palm oil, which the Commissioner of Internal Revenue considers "so minute and infinitesimal" as to indicate that it "is used solely for the purpose of producing or imparting a yellow color to the oleomargarine," is subject to the tax of ten cents per pound.

Section 8 of the amended Oleomargarine Act, which is thus interpreted by the Commissioner's ruling, is as follows:

> "Sec. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: Provided, *when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.*"

The Commissioner's ruling, upon which the government relies, apparently makes a distinction between coloration that might be caused by the use of a *large* percentage of palm oil and coloration caused by what he regarded as a *small* or minute percentage of palm oil used in the Moxley oleomargarine. In other words, while the Commissioner and the Solicitor General hold that the coloration of the Moxley oleomargarine was "artificial coloration" and subjected such oleomargarine to a tax of ten cents per pound, yet if the percentage of palm oil used had been, in the opinion of the Commissioner, *large*, the coloration due to its use would not have been regarded by him as "artificial coloration," and the tax would have been only one-fourth of a cent per pound.

Just where the line might be drawn between a *large* percentage and a *small* percentage of palm oil, neither the Commissioner nor the Solicitor General vouchsafes. The honest manufacturer, therefore, guided by the wisest counsel with the law before him, and desiring to manufacture oleomargarine, subject only to the one-fourth of a cent tax, could not foretell, if he used palm oil, which causes a resemblance to butter of a shade of yellow, whether his oleomargarine would be subject to a tax of ten cents, or of one-fourth of a cent, per pound. Moreover, if the present Commissioner ruled that such oleomargarine was subject only to the one-fourth of a cent tax, because the quantity of palm oil used was, in his opinion, *large,* and the resulting coloration therefore not "artificial," his successor in office might regard the quantity of palm oil used as *small,* and the resulting coloration, *therefore,* as "artificial," and might forthwith proceed to make an assessment for unpaid tax to the amount of nine and three-quarter cents per pound—and in such case the manufacturer would have no legal defense against the assessment, if the Commissioner's construction of the law, as set forth in his ruling above quoted, is sound.

The theory of the Commissioner, and of the Solicitor General, seems to be that coloration in oleomargarine is "artificial" when caused even by a statutory and natural ingredient, if used in such *small* quantity as to suggest the inference that it was used for the purpose of imparting color to the finished product, while, if what the Commissioner should regard as a *large* quantity of the same ingredient were substituted for a like volume of any other statutory ingredient hitherto used, as cotton-seed oil, for instance, and the avowed purpose of the substitution were thus to impart coloration to the finished product, the resulting coloration would not be "artificial." That is to say, an intent to color

which is *inferred* by the Commissioner from the use of what he regards as a *small* percentage of palm oil, makes the coloration "artificial," and subjects the oleomargarine to a tax of ten cents per pound; but an *avowed* intent to color by the use of what the Commissioner regards as a *large* percentage of palm oil, in lieu of a like volume of any other statutory ingredient, does not make the coloration "artificial," and subjects the oleomargarine to a tax of only one-fourth of a cent per pound.

Can it be that Congress ever intended that the amount of the tax,—that is, whether ten cents or a quarter of a cent per pound,—to be paid on oleomargarine should depend upon whether the *quantity* used of the material, which causes a resemblance to butter of a shade of yellow, were regarded by the Commissioner of Internal Revenue as a *small* or a *large* percentage of the volume of the finished product? Did not Congress intend that the amount of the tax per pound should depend upon the *nature* of the material, the use of which causes the oleomargarine "to look like butter of any shade of yellow?" Does the word "artificial" as used in the Act refer to an uncertain quantity of a color-giving ingredient to be fixed only in the individual discretion of the Commissioner for the time being, or does "artificial" refer to the *nature* of the material which imparts to oleomargarine a resemblance to "butter of any shade of yellow," so that the manufacturer may proceed in his business with definite certainty as to the amount of tax to be paid upon his finished product?

I.

The second section of the Oleomargarine Act of August 2, 1886, *which is not changed in the amended Act,* defines what shall be known and described as oleomargarine for the purposes of that act; and no mixture or compound is subject to the special tax imposed by that act unless such mixture or compound is fairly and clearly within the definition of oleomargarine as there defined. That section is as follows:

> "All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts, and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto and other coloring matter, intestinal fat and offal fat, *made in imitation or semblance of butter, or when so made calculated or intended to be sold as butter or for butter.*"

The Attorney General of the United States rendered an opinion October 18, 1886, to the effect that the last clause of the second section of the Act, being the words italicised above, should be construed as a qualification extending to the whole section, and "is an essential element of the statutory definition of oleomargarine."

Following the opinion of the Attorney General the second section of the Act has been since construed and applied by the Internal Revenue bureau as though it read as follows:

> "That for the purposes of this act certain manufactured substances, certain extracts and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as oleomargarine *whenever made in imitation or sem-*

blance of butter, or when so made calculated or intended to be sold as butter or for butter, namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts, and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto and other coloring matter, intestinal fat and offal fat."

This adapted form of the second section of the Act is quoted from Regulations No. 9, revised June, 1902, issued from the office of the Commissioner of Internal Revenue.

To be oleomargarine within the terms of the Act, whether before or after its amendment, a given compound must therefore have three characteristics: (a) It must be composed of the substances or some of the substances enumerated in Section 2 of the Act. (b) It must be "made in imitation or semblance of butter," that is, it must look like butter so that it might reasonably be mistaken for butter. (c) When "made in imitation or semblance of butter" it must be "calculated or intended to be sold as butter or for butter."

Unless those three characteristics co-exist in a given mixture or compound it is not oleomargarine within the terms of the statute, and is not subject to any tax imposed by the statute. For instance, it could hardly be contended either that "substances known" prior to the act "as * * * lardine, suine or neutral"; or that "mixtures and compounds of * * * lardine, suine or neutral"; or that "lard extracts and tallow extracts"; or that "mixtures and compounds of tallow, beef fat, suet, lard, lard oil," etc., are oleomargarine within the terms of the act, unless such substances, mixtures or compounds look like butter as butter

is generally known. On the other hand, if one of the enumerated substances or compounds were "made in imitation or semblance of butter," but instead of being "calculated or intended to be sold as butter or for butter," were calculated and intended to be sold as a lubricant, then such a substance or compound clearly would not be oleomargarine within the terms of the Act.

See opinion of Attorney General Garland, dated October 18, 1886. Opinions of Attorney General, Vol. 18, page 489; also see

Opinion of Commissioner Yerkes, dated January 12, 1903, published as No. 615, Vol. 6, Treasury Decisions, citing with approval Attorney General Garland's opinion and also the opinion of Judge Grosscup in *Braun & Fitts* v. *Coyne* (known as the "Fruit of the Meadow" case), rendered January, 1899, and just published for the first time in 125 Fed. Rep., advance sheets No. 4.

II.

Whether or not a given product, possessing the three statutory characteristics of oleomargarine, as defined in Section 2 of the Act, is subject to a tax of ten cents per pound, or to a tax of one-fourth of a cent per pound, depends not upon whether in fact it looks "like butter of any shade of yellow," but upon the *cause* of such resemblance if it exists. If there is such resemblance to "butter of any shade of yellow," and that resemblance is not due to "artificial coloration," the tax will be one-fourth of a cent per pound; if the resemblance is due to "artificial coloration" the tax will be ten cents per pound.

The classification made by the Solicitor General, of "colored" and "uncolored" oleomargarine, as the basis of ascertaining the rate of tax—that is, whether ten cents or a fourth of a cent per pound—is not the classification made by the 8th section of the amended Act and is not recognized or justified by any provision in the amended Act. Indeed, it is doubtful whether any "uncolored" mixture can come within the statutory definition of oleomargarine, or whether, under the Act, *any tax whatever* can fall upon what is loosely described as "uncolored oleomargarine;" for, as is pointed out above, a mixture or compound of any of the statutory ingredients is not oleomargarine, within the meaning of the Act, *except* when such mixture or compound is "made in imitation or semblance of butter" and is "calculated or intended to be sold as butter or for butter." As was said by Judge Grosscup in the "Fruit of the Meadow" case, above cited, "the tax practically is upon the product of such manufactures of leaf lard, beef fat, etc., as are made in the conscious imitation of butter. * * * The test is this: Is the product a conscious imitation of butter?" Now, has anyone ever seen an "uncolored" mixture,—a mixture without color,—which was a conscious imitation of butter or which was likely to be sold as or for butter? Unless, therefore, a mixture or compound *without color* could have such resemblance to butter and such likelihood of being sold as butter or for butter, it seems to be misleading, in discussing this case, to speak of "uncolored oleomargarine." But, whether or not there can be, under the Act, any such thing as "uncolored oleomargarine," it is certainly misleading to describe by the term "uncolored oleomargarine," the oleomargarine upon which the tax of one-fourth of a cent per pound is imposed by the Act.

What the statute provides shall be taxed at one-fourth of a cent per pound is not "*uncolored* oleomargarine," but

oleomargarine which, though it may look like butter of a shade of yellow, is yet free from "artificial coloration." Hence the purpose and effort of every manufacturer will naturally be to secure the desired resemblance to butter without the use of "artificial coloration." It is vital, therefore, alike to the manufacturer and to the government, to determine what is meant by the term "artificial coloration" as used in the statute.

III.

When is "coloration" in oleomargarine "artificial" within the meaning of the Act?

The Century Dictionary defines the word "artificial" as meaning "made or contrived by art or by human skill and labor; opposed to natural; as artificial heat or light; artificial magnet."

In this broad sense butter, produced as it is by the application of human labor to a natural product, cow's milk, is itself an artificial substance, though it have no ingredient foreign to the milk from which it is made. Such butter is nevertheless called *natural* butter, and its color is said to be *natural* because it is not due to any substance foreign to cow's milk. But if such butter have added to it coloring matter—that is, something not belonging to *natural* butter—the resulting coloration is artificial. "Artificial coloration," therefore, means the opposite of natural coloration.

By parity of reasoning, when one is speaking of oleomargarine, *natural* coloration means a coloration due to a *natural* ingredient of oleomargarine, and to find out whether a certain ingredient is a natural ingredient of oleomargarine, we turn to the statute which defines the *nature* of oleomar-

garine. If the color-giving ingredient be a *natural,* that is, a *statutory* ingredient of oleomargarine, then how can it be truly said that the color caused by such ingredient is "artificial coloration" merely because the *quantity* of such ingredient used is small or even minute, and the purpose of its use is to impart the desired color? Howsoever minute may be the quantity of palm oil used, it is none the less a vegetable oil, a *statutory,* or, so to speak, a *natural* ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as, for instance, cotton-seed oil. The statute confers no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health. But does not the government, in effect, assume such power to be in the Commissioner when, by reason of his arbitrary classification, based upon the *quantity* of palm oil used, it requires a tax of ten cents per pound upon oleomargarine containing a small or minute proportion of palm oil, while if the percentage used of that oil were large enough to constitute what the Commissioner would regard as a substantial part of the finished product, it is conceded that the tax would be only one-fourth of a cent per pound.

The Solicitor General lays stress upon the claim (not supported by the evidence unless the *ex parte* statement in the commissioner's letter [Cliff record, p. 9] be regarded as evidence) that the use of a large proportion of palm oil would render the oleomargarine deleterious to health and unfit for use. He seems to have overlooked the positive and unchallenged testimony of Prof. de la Fontaine to the contrary. (Cliff record, p. 12.) But even if that assumption

of the Solicitor General were correct how could it affect the rate of tax? For, since palm oil is a vegetable oil and is, therefore, a *statutory* or *natural* ingredient of oleomargarine, can resemblance to "butter of a shade of yellow" caused by the use of palm oil in a quantity conceded to be perfectly harmless be regarded as "artificial coloration" merely because under that assumption the use of a large proportion of palm oil would have rendered the oleomargarine subject, not to be taxed, but to be "forfeited to the United States." ("Oleomargarine Act," Sec. 15.)

On page 18 of Regulations No. 9, revised June, 1902, appears the regulation as to "artificial coloration," as follows:

> "If in the production of oleomargarine, mixtures or compounds set out in the law of 1886 are used, and these compounds are all free from *artificial coloration*, and no artificial coloration is produced by the addition of coloring matter as an independent and separate ingredient, a tax of one-fourth of one cent per pound only will be collected, although the finished product may look like butter of some shade of yellow. For example, if butter that has been *artificially* colored is used as a component part of the finished product oleomargarine, (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from *artificial* coloration, a tax of ten cents per pound will be assessed and collected. But if butter, absolutely free from *artificial* coloration, or cottonseed oil free from *artificial* coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished product, oleomargarine, has *naturally* a shade of yellow in no way procured by artificial coloration, and through the use of one or more of these unartificially-colored legal component parts of oleomargarine, the finished product should look like butter of any shade of yellow, then the product will be subject to a tax of only one-fourth of one cent per

pound, as it is absolutely free from *artificial* coloration, that has caused it to look like butter of any shade of yellow." (Italics are the Commissioner's.)

So far as concerns the oleomargarine purchased and received for sale by plaintiff in error, Cliff, this "regulation as to artificial coloration" is based upon the same construction of the eighth section of the amended Act as that which is now contended for on his behalf; for it is conceded that vegetable oils are "legally used in the manufacture of the finished product oleomargarine" and are "legal component parts of oleomargarine"; that palm oil is a vegetable oil; and that palm oil "has *naturally* a shade of yellow in no way procured by artificial coloration." With what reason, then, can it be held that this "shade of yellow," which palm oil "*naturally*" has, becomes "artificial coloration" when imparted by the palm oil to oleomargarine?

The only answer which the Commissioner gave and the Solicitor General now gives to this question is that the *quantity* of palm oil used is "*so minute and infinitesimal*" as to show that it was "used solely *for the purpose* of producing or imparting a yellow color to the oleomargarine." But if it be the fact that such was the sole purpose of the manufacturer in using a small quantity of palm oil, where, pray, in the statute is warrant found for taxing that *purpose*. Is coloration "artificial" when it results from purpose or design and "unartificial" only when it occurs *without* purpose or design, or is accidental, as it were?

The position of the government is clearly in conflict with the decisions.

In *Merritt* v. *Welsh*, 104 U. S., 694, it was held that the treasury department had no discretion but to classify the quality of sugar according to its color, although the color

test had become entirely inadequate, and although the color of the lower class was imparted in manufacture to the higher class *for the very purpose of evading the higher tax.* Speaking by Justice Bradley, the court said (p. 701):

> "The color standard has come to be a precarious one. Still, if the government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties.
>
> "Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government. If, in the case under consideration, a color standard is insufficient, a different one is ready to hand—that of the polariscope, or other chemical test. If the quantity of saccahrine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.'"

And again (p. 704):

> "If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the courts, to take the part of legislative guardians, and, by construction, to make new laws, which they imagine Congress would have made

had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, providing he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial processes for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose? If after the sugars are manufactured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different matter."

In *Seeberger* v. *Farwell,* 139 U. S., 608, it was expressly held that the introduction of a few cotton threads into woolen cloth for the very purpose of having it classed as part wool goods, and thus to evade a higher duty laid on woolen goods, would prevent the collector from classifying the goods as woolen.

The Supreme Court, by Blatchford, J., referred to the proceedings below in the Circuit Court for the Northern District of Illinois and approved the reasoning of the opinion of that court, saying (p. 610):

"The court, in its opinion, said that the Collector, in classifying the goods, evidently assumed that the

purpose of mixing the cotton with the wool was to secure a low classification, and assumed that so small a quantity of cotton would not materially change the character of the goods, as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiff for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate of duty, the court was of opinion that manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate; that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved, by the admixture of even a small percentage of cotton, if they could do so, and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

We concur in this view, and the judgment is affirmed."

This decision was followed in *Magone* v. *Luckemeyer,* 139 U. S., 612.

In *United States* v. *Schoverling,* 146 U. S., 76, 81, it was held, following the *Merritt* case, that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation."

In *United States* v. *Irwin,* 78 Fed. Rep., 799, the Circuit

Court of Appeals for the Second Circuit, speaking by Circuit Judge Wallace, said (p. 801):

> "Upon the evidence in the record, we entertain no doubt that the importations in controversy were breech-loading shotguns, which before exportation were in a completed condition, ready for the market or for the sportsman's use, in number equal to that of the stocks or the barrels, but that the parts were detached, shipped in separate cases, and invoiced separately, to enable the importer to enter them as invoiced, escape the payment of the duty upon guns, and, after importation, reassemble the parts. We are to consider to what extent this was a legitimate or a successful effort to avoid the payment of the higher duties.
>
> It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws."

And again, after referring to some of the decisions of this court (p. 802):

> "Applying these principles to the present case, we cannot escape the conclusion that if the articles in controversy were not shotguns, in the condition in which they were imported, they were not dutiable as such, notwithstanding they had been shotguns previously, and could readily be again transformed into shotguns, and notwithstanding they had been taken apart and imported in fragments merely for the purpose of escaping the duty upon shotguns."

The principle and language of the opinion in *Morrill* v. *Jones,* 106 U. S., 466, is also directly in point. The court, speaking by Chief Justice Waite, there said (p. 467):

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case,

we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

IV.

Doubt, if there be any, in this case, should be resolved in favor of the plaintiff in error.

In *United States* v. *Wigglesworth*, 2 Story, 369, Mr. Justice Story, in giving reasons for holding that the Revenue Act of 1841 did not intend to levy a permanent tax on indigo, said:

> "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. *In every case, therefore, of doubt,* such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed or presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense remedial laws, or laws founded upon any public policy, and therefore are not to be liberally construed. Hence

in the present case, if it be a matter of real doubt whether the intention of the Act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty beyond the period when it would otherwise be free."

In *Hartranft* v. *Wiegmann,* 121 U. S., 609, the court said that:

"If the question were one of doubt, the doubt would be resolved in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations," citing:

Powers v. *Barney,* 5 Blatchf., 202.
U. S. v. *Isham,* 84 U. S. (17 Wall.), 496, 504.
Gurr v. *Scudds,* 11 Exch., 190, 191.
Adams v. *Bancroft,* 3 Sumn., 384.

In *United States* v. *Isham,* 17 Wall., 496, the court said:

"If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr* v. *Scudds,* 11 Exch., 191, 'a tax cannot be imposed without clear and express words for that purpose,'" citing *Conroy* v. *Warren,* 3 Johns. Cas., 259;

As the practical question involved in the pending issue is really a question of classification, a case specially in point is that of the *American Net & Twine Company* v. *Worthington, Collr.,* 141 U. S., 468.

That was a suit to recover excess duties paid under protest on gilling twine (subject to 25% duty), which had been classified by the customs officials as linen thread (subject to 40% duty) and assessed at the higher rate. In sustaining the claim of the importer, the Supreme Court said:

"We think the intention of Congress that these goods should be classified as 'gilling twine' is plain; but were

the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language," citing:

U. S. v. *Isham,* 17 Wall., 496.

Hartranft v. *Wiegmann,* 121 U. S., 609.

Gurr v. *Scudds,* 11 Exch., 190.

See, also,

Eidman v. *Martinez,* 184 U. S., 578, 583.

Rice v. *U. S.,* 53 Fed. Rep., 910, 911.

Matheson & Co. v. *U. S.,* 71 Fed. Rep., 394, 395.

In re Southern Pacific Co., 82 Fed. Rep., 311, 313; 87 Fed. Rep., 863.

Schoenemann v. *U. S.,* 119 Fed. Rep., 584, 587.

Dean v. *Charleton,* 27 Wis., 522, 526.

V.

If, by the eighth section of the amended Act, Congress intended what this brief contends for as being the proper construction of that section, it would seem to be impossible that Congress intended, by the fourteenth section of the amended Act, to confer upon the Commissioner of Internal Revenue, power to defeat the intention expressed in the eighth section. If, by the eighth section, Congress imposed a tax of only one-fourth of a cent per pound upon such oleomargarine as that which was purchased and received for sale by the plaintiff in error, it would seem to be a legal solecism to say that, under the fourteenth section, the Commissioner of Internal Revenue may impose a tax of ten cents per pound upon such oleomargarine.

All the cases cited in the Government's brief, in discussing the fourteenth section, go to the point that Congress may confer upon an executive officer the power to ascertain and determine facts and to *apply the law* to the facts when ascertained. But such a power is quite different from the power to determine *finally* what is the law—which latter is the power in effect claimed for the Commissioner of Internal Revenue by the Government in this case. Here the facts are entirely undisputed, and the question presented is purely a question of law, namely, whether resemblance to "butter of any shade of yellow," caused by the admixture of palm oil in the manufacture of oleomargarine, is "artificial coloration" within the meaning of the amended Act.

In *U. S.* v. *200 Barrels of Whiskey,* 95 U. S., 571, 576, holding that a particular construction of the internal revenue law by the Commissioner of Internal Revenue was unwarranted, the court, by Chief Justice Waite, said:

> "The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."

The invalidity of the disputed clause in the fourteenth section of the amended Act, if that clause means what the Government contends that it means, seems to be established by the decision in *U. S.* v. *Eaton,* 144 U. S., 678, 687-8, where the court, speaking by Justice Blatchford, said:

> "It was said by this court in *Morrill* v. *Jones,* 106 U. S., 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under § 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes

from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States."

* * * * *

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under § 18 of the act."

VI.

It is not proposed to argue here the question raised on the hearing as to the validity of a waiver of a jury in this case, in view of the provisions in the Constitution of the United States guaranteeing a trial by jury. But the writer ventures in that connection to refer to the cases of *Callan* v. *Wilson,* 127 U. S., 540, and *Thompson* v. *Utah,* 170 U. S., 343, 353-4, in the former of which a jury trial had been demanded, and in the latter of which the State claimed that a jury of twelve had been waived by the accused by his failing to object to trial by a jury of eight until after verdict.

In *Callan* v. *Wilson,* Callan had been convicted of conspiracy before the police court of the District of Columbia and was sentenced to pay a fine of $25.00, and upon default in its payment to suffer imprisonment in jail for a period of thirty days. Callan not having paid the fine

and having been imprisoned, a writ of *habeas corpus* was sued out on the ground that he was restrained of his liberty in violation of the Constitution, as the statute did not make provision for a jury trial in the police court. This court said:

> "The third article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment.' The word 'crime' in its more extended sense comprehends every violation of law; in a limited sense it embraces offenses of a serious or atrocious character. In our opinion the provision is to be interpreted in the light of the principles which at common law determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be considered as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanor, the punishment of which *involves or may involve the deprivation of the liberty of the citizen.*"

The reasoning of the court in *Thompson* v. *Utah*, also seems to proceed upon the idea that the right of trial by jury, as it existed at common law, could not be denied or waived *where the accused might be deprived of his life or liberty.*

It seems, therefore, pertinent to call attention to the fact that in the case at bar, in which a trial by jury was expressly waived, the offense charged was punishable by fine only (Sec. 11 of the "Oleomargarine Act") and that the district court neither did nor could impose a penalty of imprisonment.

It is respectfully submitted that the judgment of the lower court in the Cliff case should be reversed on the merits of that case, even though the constitutional questions involved in the consolidated cases, and already so ably and fully discussed by counsel, should be determined adversely to the plaintiffs in error in those cases.

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Washington, October Term, 1903.